

Within the prescribed conditions, "capture" became technical and institutional, and rights grew out of it. The woman had a status which was defined by custom, and was very different from the status of a real captive. Marriage was the institutional relation, in the society and under its sanction, of a woman to a man, where the woman had been obtained in the prescribed way. She was then a "wife." What her rights and duties were was defined by the mores, as they are to-day in all civilized society.

62. Laws. Acts of legislation come out of the mores. In low civilization all societal regulations are customs and taboos, the origin of which is unknown. Positive laws are impossible until the stage of verification, reflection, and criticism is reached. Until that point is reached there is only customary law, or common law. The customary law may be codified and systematized with respect to some philosophical principles, and yet remain customary. The codes of Manu and Justinian are examples. Enactment is not possible until reverence for ancestors has been so much weakened that it is no longer thought wrong to interfere with traditional customs by positive enactment. Even then there is reluctance to make enactments, and there is a stage of transition during which traditional customs are extended by interpretation to cover new cases and to prevent evils. Legislation, however, has to seek standing ground on the existing mores, and it soon becomes apparent that legislation, to be strong, must be consistent with the mores.¹ Things which have been in the mores are put under police regulation and later under positive law. It is sometimes said that "public opinion" must ratify and approve police regulations, but this statement rests

on an imperfect analysis. The regulations must conform to the mores, so that the public will not think them too lax or too strict. The mores of our urban and rural populations are not the same ; consequently legislation about intoxicants which is made by one of these sections of the population does not succeed when applied to the other. The regulation of drinking places, gambling places,

¹ " In the reigns of Theodosius and Honorius, imperial edicts and rescripts were paralyzed by the impalpable, quietly irresistible force of a universal social need or sentiment." — Dill, *Rome from Nero to M. AureL*, 255.